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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

AINTREE CORPORATION,
a Corporation,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
} No. 702.

PETITIONER'S REPLY BRIEF.

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I.

A Reply to Point 1 (Pages 11-15) of the Argument in the Brief of the National Labor Relations Board.

In its brief filed in this court the board vigorously attempts to minimize the scope and effect of its own decision.

The Board found that the mere attendance of supervisory employees, of their own volition, at union meetings constitutes "activity" by such employees on behalf of

their employer, and that it was the petitioner's duty, under the Act, to restrain and prevent such attendance. While apparently recognizing the importance and gravity of such policy-making decision, the Board, in opposing a review thereof by this Court, suggests that such decision is not the sole foundation and basis of that portion of the Board's order which finds that petitioner "dominated and interfered with the formation and administration of (The Better Union) and contributed support thereto."

We will presently show that such finding concerning The Better Union is fundamentally dependent and based upon the Board's said conclusion with respect to the petitioner's failure to "**restrain**" its supervisory employees from attending meetings of The Better Union. Irrespective of this consideration, however, the fact remains that there is now outstanding a final decision of the Court below, to the effect that an employer is guilty of an unfair labor practice if he fails to restrain his supervisory employees from attending meetings of the union of their choice, notwithstanding the fact that such attendance constitutes their sole union "activity" (B. A. 363, 366; Appellate Proceedings 324-326).

Obviously, the gravity of this decision of the Court below, and the uncertainties created thereby as to the right of supervisory employees to freely attend meetings of a union of their own choice, and the liabilities of the employer resulting from the exercise by them of such rights, alone and independent of every other consideration, present a question of general importance which should be decided by this Court.

Moreover, if the Board's order, as sustained by the Court below, is permitted to stand, petitioner might be charged with contempt if it should fail to take all effective means, including discharge, if necessary, in order to "restrain" and prevent its supervisory employees from attending

union meetings or joining a union. On the other hand, if petitioner should take "effective means" to prohibit such attendance (thereby interfering with the rights of such employees, under the Act) the petitioner might likewise be charged with being in contempt of the decree.

This case is in a category entirely different from that of cases relied on by the Board.* In the instant case, the sole "activity" of the supervisory employees was the mere attendance by them of their own volition, at meetings of the union of their choice. There is no finding that they ever engaged in any union activity on the employer's time or property, or that they at any time, or at any place, solicited members for The Better Union. If mere attendance at union meetings, by foreman and foreladies, can render the employer guilty of dominating and interfering with such union and contributing support thereto, and if the employer must therefore prevent such attendance, as the Board and the Court below have held, it follows that a supervisory employee has none of the rights guaranteed by the Act.

If a permissible inference and finding of coercion and interference may be made from the fact that the petitioner did not "restrain" or check its foremen and foreladies from attending meetings of a union of their choice, then there is no manner in which such supervisory employees may exercise their theoretical rights under the Act, without liability on the part of their employer. There is no evidence here that the supervisory employees were acting on behalf of the petitioner. The inference that they were so acting is drawn by the Board solely from their super-

*In International Association of Machinists v. National Labor Relations Board, 311 U. S. 72, here cited by the Board, this Court said (l. c. 77): "This active solicitation (by supervisory employees) * * * was on Company time and was made openly in the shop." (Emphasis ours).

In National Labor Relations Board v. Christian Board of Publication, 113 F. (2d) 678, 680, 681, the Eighth Circuit Court of Appeals pointed out that "with the aid of foremen and other supervisory employees" petitions were circulated "during working hours."

visory capacity. Since this inference, if proper, could be drawn in any case with respect to supervisory employees, then the decision necessarily means that the mere attendance by foremen and foreladies, at meetings of a union of their choice, constitutes coercion and interference by the employer.

True it is, that membership or eligibility to membership in a union does "not require the Board to disregard * * * circumstances" which indicate that in opposing a union, supervisory employees "WERE EMULATING THE EXAMPLE SET BY THE MANAGEMENT" with respect to hostility to such union. International Association of Machinists v. N. L. R. B., 311 U. S. 72, 81. But we know of no case in which a Court has held, as in this case, that the mere attendance by supervisory employees at meetings of the union of their choice, constitutes domination of and interference with such union by the employer. Further, as is stated in the dissenting opinion of Circuit Judge Major herein:

> "* * * The unfavorable background, so heavily stressed by the Supreme Court in cases such as INTERNATIONAL ASSOCIATION OF MACHINISTS, TOOL AND DIE MAKERS V. NATIONAL LABOR RELATIONS BOARD, 311 U. S. 72, AND INTERNATIONAL LABOR RELATIONS BOARD V. LINK-BELT COMPANY, 311 U. S. 584, places the instant case in a different category. This background, how-however, has been completely ignored by the Board. There is not a scintilla of evidence of any anti-union history—that respondent has ever fostered company union, broken strikes, been guilty of espionage or of any character of hostility against or favoritism toward any union or member thereof * * *" (Appellate Proceedings 327).

We have heretofore stated that in the respects hereinabove mentioned, the Board's order is fundamentally

dependent upon the Board's conclusion as to the petitioner's failure to "restrain" its foremen and foreladies from attending meetings of The Better Union.

There is no evidence or finding that former supervisory employee Baker ever took any part in the formation, administration or activities of The Better Union; or that he ever, directly or indirectly, solicited members for that organization, or attended any of its meetings. A most casual reading of the Board's decision with respect to The Better Union, demonstrates that the Board's finding that petitioner dominated and interfered with the formation and administration of such union, is based upon the supervisory employees' attendance at meetings of The Better Union.

Following its finding that "* * * all the (petitioner's) supervisors of foremen rank continued unchecked to attend T. B. U. meetings and continued thereby to throw the (petitioner's) support to that organization", the Board found that "IN ADDITION, the freedom of action which the (petitioner) accorded (employee) Anthis demonstrated to the (petitioner's) employees that Anthis was acting as an agent for the petitioner and that it approved of his activities" (B. A. 363; emphasis ours). Thus, the Board's finding is fundamentally based on the supervisory employees' "unchecked" attendance at meetings of The Better Union. The "freedom of action" allegedly accorded Anthis was obviously viewed by the Board itself, as only a factor which, when considered "in addition" to the supervisory employees' said attendance, "demonstrated" to the petitioner's employees that the petitioner favored The Better Union.

The evidence respecting the alleged "freedom of action" of Anthis, is summarized on Page 12 of the Petition filed by petitioner in this Court. If, as the Board now suggests, the Court may disregard the findings respecting the supervisory employees' attendance at meetings of The Better

Union, the only remaining alleged evidence of the petitioner's "domination" of and "interference" with The Better Union, would be the evidence concerning the alleged "freedom of action" of Anthis. We respectfully submit that such evidence is no more than mere conjecture or speculation and falls far short of justifying any inference that petitioner "dominated and interfered with the formation and administration of (The Better Union)" and contributed support thereto.

II.

A Reply to Point 2 (Pages 15-16) of the Argument in the Board Brief.

In footnote 14, on page 16 of its brief, the Board has cited several Circuit Court decisions which the Board claims have held proper the requirement that an employer post notices similar to that directed in paragraph 2 (d) of the order (B. A. 371).

In not a single one of the opinions so cited by the Board is there any language or statement which even remotely indicates that this issue was either raised by the parties or considered by the Court.

There is absolutely nothing in any of said opinions which in any way considers or decides the propriety of requiring an employer to post a notice which, while stating that employees are free to join or remain members of a specifically named organization, fails to further state and inform the employees that they are free to join or organize any union they choose without being limited to the **sole** organization designated in such notice. Hence, said opinions in no way remove the conflict in the respect mentioned between the decision of the Court below and the decisions of the Second, Third, Sixth and Eighth Circuit Courts of

Appeals cited by the petitioner in number II of its "**REASONS RELIED ON FOR ALLOWANCE OF WRIT**" (Pages 17-18 of Petition for Certiorari; Pages 25-27 of Petitioner's Supporting Brief).

In those cases, so relied on by the Petitioner, the said Circuit Courts did not (as is here suggested by the Board) regard the changes which they required to be made in the notices as "minor." On the contrary, they considered such changes as involving matters of substance, and required by good faith in the effectuation of the intent and spirit of the Act.

Such conflict between the decision of the Court below and the decisions of said other Circuit Courts of Appeals (which conflict the Board itself recognizes on page 16 of its Brief) involves vital rights of employees under the Act, which should be settled by this Court.

Respectfully submitted,

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Petitioner.